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Insolvency Law

Developments in insolvency law: adoption and interpretation of the UNCITRAL Model Law on Cross-Border Insolvency and developments in interpretation of "centre of main interests" in the European Union

Note by the Secretariat

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I. Introduction

1. This note reports on developments occurring since document A/CN.9/580 of 15 April 2005 in the area of cross-border insolvency law, including with respect to the adoption and interpretation of the UNCITRAL Model Law on Cross-Border Insolvency and interpretation of the term "centre of main interests" in cases in the European Union under the European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (ECR).

2. The cases interpreting provisions of the ECR are included in this paper as they may prove to be of assistance to interpretation of analogous provisions of the Model Law. The jurisprudence in the EU remains somewhat unsettled with respect to, for example, interpretation of the term "centre of main interests" and the Commission may wish to ask the secretariat to continue monitoring the decisions of courts of the European Union with a view to facilitating interpretation of the Model Law.

II. Developments in cross-border insolvency

(a) Adoption of the UNCITRAL Model Law on Cross-Border Insolvency

3. Legislation based on the Model Law has now been adopted by Eritrea; Mexico;[1] Serbia and Montenegro (both jurisdictions[2]); Japan;[3] South Africa;[4] Romania;[5] Poland;[6] the British Virgin Islands;[7] the United States of America[8] and the United Kingdom of Great Britain and Northern Ireland.[9] In 2000, the United Kingdom enacted legislation enabling the Model Law to be implemented by regulation. Those regulations, the Cross-Border Insolvency Regulations, came into effect on 4 April 2006 (the regulations do not apply in Northern Ireland). A number of countries have draft legislation based upon the Model Law under consideration, including Argentina and Pakistan, while other countries have recommended adoption of such legislation, including Australia, New Zealand and Canada. The Spanish Insolvency Act 22/2003, which came into force in 2004, includes international insolvency provisions inspired by the Model Law, as well as provisions based on the ECR.

(b) Developments in interpretation of the Model Law

4. The following is a brief summary of recent decisions under Chapter 15 of the United States Bankruptcy Code, which implements the UNCITRAL Model Law on Cross-Border Insolvency and entered into force on 17 October 2005. Those cases are included in this paper to provide information on implementation and interpretation of the Model Law in jurisdictions where it has been adopted. It is expected that these cases will also be included in UNCITRAL's Case Law on UNCITRAL texts (CLOUT) system.

5. *Ian Thow* (United States, 2005).[10] Ian Thow officially filed the first petition under Chapter 15 of the United States Bankruptcy Code ("Chapter 15 petition") in the Seattle, Washington, on 2 November 2005, seeking recognition in the United States of a foreign main proceeding pending in British Columbia, Canada. The United States court recognized the proceedings in British Columbia as foreign main proceedings on the basis that virtually all of the debtor's assets and creditors were

located in British Columbia, which was therefore his centre of main interests. The court made orders under section 1521 of the Bankruptcy Code that (a) continuation and commencement of individual actions concerning the debtor's assets and execution against the debtor's assets were stayed; (b) the right to transfer or encumber or otherwise dispose of the debtor's assets in the United States was suspended; (c) the debtor should make himself and pertinent records available for inspection and examination by the Canadian trustee; (d) the debtor's assets in the United States that would be property of the debtor's estate under the Bankruptcy Code should be administered by the Canadian trustee; and (e) the debtor should cooperate with the Canadian trustee with respect to its rights and duties under the order. The court reserved its decision on choice of law issues relating to the assets comprising the debtor's estate.

6. *TriGem Computer Inc.* (United States, December 2005).[11] After experiencing financial difficulties, TriGem, one of the world's largest makers of computers, became the subject of a reorganization case under South Korean law. Since TriGem also had creditors in the United States, the Receiver appointed for TriGem in the Korean reorganization proceedings filed a Chapter 15 petition on behalf of TriGem, principally to have the automatic stay enjoin litigation that was pending against TriGem in the United States. On 7 December 2005, the United States court recognized the Korean reorganization proceeding filed by TriGem's corporate parent as a "foreign main proceeding" under Chapter 15 and enjoined creditors from proceeding against TriGem's United States assets. The evidence presented to the court that the Republic of Korea was TriGem's centre of the main interests consisted of the sworn statement of the foreign representative to the effect that TriGem's head office, branch offices and business, research and training centres were all located in various parts of the Republic of Korea.

7. *La Mutuelle Du Mans Assurances IARD* (United States, December 2005).[12] The United Kingdom branch, *La Mutuelle Du Mans Assurances IARD* (MMA), of a French insurer was the subject of insolvency proceedings under the Companies Act of 1985 of Great Britain, pursuant to which the court had approved a scheme of arrangement on 28 October 2005. MMA filed a Chapter 15 petition in New York on 11 November 2005 to gain time to make payouts under the approved scheme and to prevent creditors from suing it or attaching its assets in the United States. Having found that the debtor's centre of main interests was in the United Kingdom, not France, the court recognized the foreign proceedings as foreign main proceedings under Chapter 15 and permanently enjoined creditors from moving against MMA's assets. The court made a number of orders concerning conduct of the proceedings, including that "[t]he scheme of arrangement sanctioned by the U.K. High Court in the foreign proceeding shall be given full force and be binding on all persons and entities in the United States."

(c) Developments in interpretation of "centre of main interests" under the ECR

8. The following brief summary reflects a selection of decisions on interpretation in the EU of the term "centre of main interests". The Model Law does not define the term "centre of main interests", but article 16 (3) contains a rebuttable presumption that it will be the debtor's registered office or, in the case of an individual, its habitual residence. Article 3 (1) of the ECR contains a similar presumption regarding the registered office and Recital 13 indicates that the centre of main

interests is the place where the debtor conducts the administration of its interests on a regular basis and is therefore ascertainable by third parties.[13]

9. *Shierson v. Vlieland-Boddy* (United Kingdom, July 2005).[14] This case clarified the point at which a debtor's centre of main interests is to be determined. The court of first instance decided that the time for consideration of the centre of main interests was the time of the decision to open proceedings. On appeal, however, the Court of Appeal held that the relevant time was when the court was first required to decide whether to open insolvency proceedings. The key date should therefore be the time of the first hearing of the bankruptcy petition or, where there has been an application for permission to serve the petition outside the jurisdiction or for interim relief in advance of the hearing of the bankruptcy petition, the hearing of that application. The Court also held that if a debtor moved to another EU country deliberately trying to avoid insolvency proceedings by altering its centre of main interests, there was nothing to prevent this, provided that the Court was satisfied that any such relocation by the debtor was based on substance and had the necessary element of permanence.

10. *Re TXU Europe German Finance BV* (United Kingdom, October 2004).[15] This case addressed whether it is possible to place companies incorporated in other parts of the EU into creditors' voluntary liquidation in the United Kingdom. Notwithstanding the wording of section 73 (1) of the Insolvency Act 1986 and section 735 (1) of the Companies Act 1985 (which suggest that a foreign company cannot be wound up voluntarily), the court, following the case of *Re BRAC Rent-A-Car International Inc.*, held that under the ECR it is possible for a foreign company to be wound up voluntarily when its centre of main interests is in the United Kingdom, provided the company has the capacity under its domestic law to pass the relevant resolution. In this case, the court accepted foreign legal advice that such a resolution could be passed under the law of Ireland and the Netherlands, the relevant places of incorporation.

11. *Aircraft* (Czech Republic, April 2005).[16] This case involved conflicting decisions by different courts in two Member States, both opening main proceedings. A creditor applied to open insolvency proceedings at the Prague Regional Court (Czech Republic). Pending that court's decision, the debtor applied for insolvency proceedings at the Regional Court of Hamburg (Germany), asserting that his centre of main interests was in Hamburg. Before the Regional Court of Hamburg issued its decision, the Prague Regional Court appointed a provisional administrator. After the Regional Court of Hamburg issued a decision opening a main proceeding, the Prague Regional Court also issued a decision opening a main proceeding, on the ground that the centre of main interests of the debtor was situated in the Czech Republic: the debtor's private domicile was in the Czech Republic and he conducted professional activities in the tourism sector almost every day by recommending his products to travel agencies in the local newspapers. The Prague Regional Court stated that in order to establish which proceedings had priority, the moment to consider was the date of the first decision issued on the case. Since it had issued two decisions (one ordering the debtor to express his opinion on the creditor's application, and one appointing a provisional trustee) prior to the decision of the German court opening proceedings, the Prague court took the view that the German proceedings were to be considered secondary proceedings. The debtor has appealed

against the decision of the Prague court and the creditor against the decision of the Hamburg court.

12. *Silvalux Sarl* (Luxembourg, April 2004).[17] This case involved the determination of the centre of main interests of a company, registered in France with a subsidiary in Luxembourg. The court found that the centre of main interests of the company was in Luxembourg, on the grounds that registered mail sent to the head office in France was returned with the notation that the addressee did not reside at the address indicated and the employees of the company were registered with the social security authority in Luxembourg.

13. *UK Rover Group* (United Kingdom, May 2005).[18] The High Court found it had jurisdiction to make administrative orders in relation to the affairs of 8 national wholly owned sales subsidiaries of the English company MG Rover Overseas Holding Ltd, which had their places of incorporation in different EU countries. The court based its decision on the following findings of fact. Firstly, the management of the national sales companies invariably included at least one director resident in the United Kingdom, and no other nationalities were common to the boards of the national sales companies. In addition, five of the national sales companies had a board with a majority of United Kingdom residents and the staff structure was such that all senior staff of the national sales companies were appointed by direct specific authorization from the international headquarters in the United Kingdom. Secondly, as to the financial structure, each of the national sales companies operated under an annual budget submitted and approved by the headquarters in the United Kingdom; the headquarters played the key role in budget setting, financial scrutiny and funding; and no national sales company could describe itself as having autonomy. Thirdly, in terms of trading, the evidence clearly established that no national sales company had an autonomous and independent existence. Finally, the general overview was that the national sales companies clearly together formed a subsidiary network within part of an international group structure.

14. *AvCraft* (Germany, June 2005).[19] The factories of AvCraft Aerospace GmbH, the German subsidiary of AvCraft Aviation of Leesburg, Va., were situated in Oberpfaffenhofen (Germany). The German court found that the debtor's centre of main interests was in Oberpfaffenhofen as that was where the raw materials were delivered and where the legal and economic network, in particular with respect to suppliers, was promoted and developed. All the relevant entrepreneurial activities, such as purchases, management of personnel, accounting and the overall key business were also carried out there. The court rejected the presumption in the ECR that the place of registration of the debtor, in this case Dublin, would be its centre of main interests.

15. *Hukla* (Germany, August 2004).[20] The court found that the centre of main interests of the debtor (an Austrian marketing company) was in Germany, notwithstanding that its place of registration was Vienna. The Austrian company had to be considered a commercial unit of the German company, as it lacked economic independence and its move to Austria some years before the opening of the insolvency proceedings was for tax reasons and reasons related to retail-trade facilities. In reaching this conclusion, the Court took into account several factors: the management of the mother company, situated in Germany, provided strategic and operational guidance for the activities of the Austrian subsidiary; the budget of the Austrian company was regularly submitted to the management of the German

company for approval; the organization and supervision of the marketing activity carried out by the sales representatives of the Austrian company took place in German; and most relevant commercial books and documents were kept in Germany.

16. *Collins & Aikman* (United Kingdom, July 2005).[21] The English court considered an application for administration orders in respect of 24 companies of the *Collins & Aikman Corporation Group* (whose headquarters was in the United States of America), incorporated in different EU countries. It found that, according to article 3, abs. 1 (the presumption as to centre of main interests) of the ECR, it had jurisdiction over all of the companies on the grounds that: the manager entrusted with coordinating all cash management functions for the European companies was based in England; all cash co-ordination functions, principally concerning payment approval of daily cash calls made by individual plants, were based in England; the pooling bank accounts for the EU operations were held with a bank in London; human resources for Europe were coordinated from England; information systems for Europe were run from England; the engineering design for Europe was based in England; the majority of the sales functions in relation to the European operations were dealt with from England; and the strategic decision making in relation to the European operations had been largely undertaken by a committee based in England and consisting of majority of United Kingdom executives.

17. *Dental Technician* (Germany, April 2005).[22] The German court stated that, in order to avoid legal uncertainty, the time for consideration of the centre of main interests was the time of the submission of the petition, and not the time when the debts were incurred. The court left open the questions of whether the time for assessing the centre of main interests could be when the decision opening the proceedings was made and of which judge was competent in the event the debtor had moved its centre of main interests after the submission of the petition, but before the decision was made. As to the criteria for determining the debtor's centre of main interests, the court observed that, as far as an employee was concerned, the domicile or place of habitual residence was relevant. In the case at hand, both the domicile and the place of habitual residence of the debtor were in England; the debtor carried out his professional activity as a dental technician in England and had shown no intention of going back to Germany; by the time of the submission of the petition, he had already taken steps to finalise his professional and personal affairs in Germany; he had a valid address in England and conducted his business correspondence from there; and he administered personal assets located in Germany from England.

Notes

[1] Ley de Concursos Mercantiles, D.O. 12 de Mayo de 2000 (Mex.).

[2] Serbia: Law on Bankruptcy Proceedings 2004, Part XII International Bankruptcy; Montenegro: Law on Business Organization Insolvency, February 2002.

[3] Law relating to Recognition and Assistance for Foreign Insolvency Proceedings (Law No. 129 of 2000).

[4] Cross-Border Insolvency Act, 42 (2000), art. 34 (S. Afr.).

[5] Law No. 637 of 7 December 2002 on Regulating Private International Law Relations in the Field of Insolvency.

[6] Law on Insolvency and Restructuring of 28 February 2003.
[7] Insolvency Act, 2003. The Act, which came into force in August 2004, includes provisions on cross-border insolvency (Part XVIII); this Part has not yet entered into force. Part XIX Orders in Aid of Foreign Proceedings, which has entered into force, allows applications from foreign representatives for various types of relief to aid the foreign proceedings and specifies the matters to be taken into account by the court in ordering that relief. This Part includes provisions similar to those included in articles 5, 7 and 10 of the Model Law.
[8] United States Bankruptcy Code, chapter 15.
[9] Insolvency Act 2000.
[10] U.S. Bankruptcy Court for the Western District of Washington (unpublished order).
[11] U.S. Bankruptcy Court for the Central District of California, case no. 2:05-bk-50052-tD, December 7 2005 (unpublished order).
[12] U.S. Bankruptcy Court for the Southern District of New York (Judge Burton R. Lifland), 7 December 2005.
[13] For further information on these and other relevant cases see www.eir-database.com.
[14] Court of Appeal, Civil Division, 28 July 2005; [2005] EWCA Civ. 974.
[15] [2005] BPIR 209.
[16] Prague Regional Court, 26 April 2005, 78 K 6/05-127.
[17] Tribunal de Luxembourg, 15 April 2005 (II No. 365/05).
[18] High Court of Justice, Chancery Division, 11 May 2005.
[19] AG Weilheim i.OB, 22 June 2005 (IN 260/05).
[20] Offenburg District Court, 2 August 2004.
[21] High Court of Justice, 15 July 2005, [2005] EWHC 1754 (Ch).
[22] AG Celle, 18 April 2005 (29 IN 11/05).